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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,
Plaintiff,
v.
GOOGLE INC.,
Defendant.

Case No. 3:10-cv-03651 WHA

**GOOGLE'S 4/5/12 COPYRIGHT
LIABILITY TRIAL BRIEF**

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1 **I. Oracle cannot retract its concession about the Java programming language.**

2 Oracle seeks to rewrite its concession that the Java programming language is free and
 3 open for anyone to use. Although again conceding that anyone can use the language to *write*
 4 programs, Oracle now claims that if developers want a computer to *understand what they have*
 5 *written*, that requires a license. *See* Oracle 4/3/12 Br. [Dkt. 853] at 5.

6 The Court should not condone this legal sophistry. It is both contrary to Oracle's prior
 7 representations to the Court, *see* Google 3/23/12 Br. [Dkt. 823] at 4-5, and internally inconsistent.
 8 When developers write programs that include API calls, they invoke the structure and
 9 arrangement of the APIs. For example, in order to retrieve content from a website using the
 10 getContent() method, the developer must include statements in the source code that indicate that
 11 the getContent() method is in the URL class in the java.net package. Oracle *concedes that this*
 12 *requires no license*. Yet Oracle argues that Google could not *implement* this method with its own
 13 source code because, according to Oracle, the structure and arrangement of this method are
 14 copyrighted. Oracle's concession that the language is free and open for anyone to use is
 15 fundamentally inconsistent with its claim that Google's use of the APIs infringes.¹

16 **II. Section 102(b) denies copyright protection to the 37 APIs.**

17 **A. Section 102(b) excludes eight categories from copyright protection.**

18 Oracle claims that Professor Samuelson incorrectly argues that Section 102(b) means what
 19 it says. Professor Samuelson argues that the eight categories of exclusion in Section 102(b)—
 20 “idea, procedure, process, system, method of operation, concept, principle, or discovery”—must
 21 each be given meaning. *See* Pamela Samuelson, *Why Copyright Law Excludes Systems and*
 22 *Processes from the Scope of Protection*, 85 TEX. L. REV. 1921, 1923 (2007) (“Samuelson”).

23 Professor Samuelson is, of course, correct. “It is a cardinal principle of statutory
 24 construction that a statute ought, upon the whole, to be so construed that, if it can be prevented,
 25 no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*,

26

¹ Oracle argues that Google's counterclaims state the APIs are not part of the language. That is
 27 not true. Google distinguished between the language, the runtime, and the entire platform.
 28 Google's Am. Counterclaims [Dkt. 51], ¶ 1. Those things *are* different. The runtime, for
 example, includes a virtual machine. The platform further includes written documentation.

1 534 U.S. 19, 31 (2001) (quotation marks and citation omitted). Oracle concedes that “[t]o the
 2 extent that a system or method of operation *is an idea*, it cannot be copyrighted.” Oracle 4/3/12
 3 Br. at 2 (emphasis added). But Section 102(b) says more than that—it says that systems and
 4 methods of operation cannot be copyrighted, period. Had Congress intended to say that systems
 5 and methods of operation were unprotectable only if they also are “ideas,” it would have so said.

6 Oracle relies on the fact that many courts have referred to Section 102(b) as a codification
 7 of the so-called idea/expression dichotomy. But the word “idea” in “idea/expression dichotomy”
 8 is shorthand for the longer list of unprotectable categories in Section 102(b):

9 Section 102(b) codifies one of copyright law’s fundamental distinctions—
 10 copyright protection extends to an author’s *original expression* and not to the
 11 *ideas* embodied in that expression. Thus, when considering whether a defendant
 12 copied protectable elements of a copyrighted work, we must determine whether or
 13 to what extent the copied portions constitute ideas, *processes, systems, or methods*
 14 *of operation*, on one hand, or protectable expression, on the other.

15 *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1370-71 (10th Cir. 1997) (emphases added).

16 We also know that Section 102(b) excludes more than ideas because that is what Section
 17 102(b) says, and the legislative history confirms it. “Section 102(b) in no way enlarges or
 18 contracts the scope of copyright protection under the present law.” H.R. Rep. No. 94-1476, at 57
 19 (1976). “[P]resent law” was pre-1976 Act cases. That Section 102(b) was intended to “restate, in
 20 the context of the new single Federal system of copyright, that the basic dichotomy between
 21 expression and idea remains unchanged,” *id.*, confirms that the “idea/expression dichotomy” is
 22 shorthand for referring to the limitations developed through pre-1976 Act cases. *See Samuelson*,
 23 85 TEX. L. REV. at 1924-44 (discussing pre-1976 Act cases).

24 That said, there is no dispute that “computer programs” may be copyrightable subject
 25 matter. A computer program is “a set of statements or instructions to be used directly or
 26 indirectly in a computer in order to bring about a certain result.” 17 U.S.C. § 101. The Court
 27 thus should not interpret Section 102(b) to render computer programs *per se* unprotectable. But
 28 this does not require limiting excluded “systems” and “methods of operation” to “ideas,” as
 Oracle argues. Section 102(b) already excludes ideas expressly, so excluding “systems” and
 “methods of operation” only if they are also ideas would render those terms superfluous.

1 Whatever the limits of Section 102(b), the selection, arrangement and structure of the
 2 APIs fall on the unprotected side of the divide. The APIs “*tell the programmer how to use the*
 3 *library*, and include a set of names that can be *used to access different features of the library*,
 4 together with conventions about their use.” Oracle Copyright MSJ Opp. [Dkt. 339] at 2
 5 (emphasis added). That is, they are a system or method of operation. And as Oracle implicitly
 6 concedes,² the APIs, divorced from the noninfringing source code, do not even qualify as a set of
 7 instructions for bringing about “a certain result.” *See* 17 U.S.C. § 101; Google 4/3/12 Br. [Dkt.
 8 852] at 5-6. The APIs thus are at the abstract, unprotectable end of the dichotomy.

9 Oracle argues that the reasoning in *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807
 10 (1st Cir. 1995), *aff'd by an evenly divided court*, 516 U.S. 233 (1996), proves too much, and
 11 would preclude copyright protection for all computer programs. Nothing suggests that the *Lotus*
 12 court intended such a result. First, Lotus did not allege that Borland had copied any computer
 13 code, so that issue was not before the First Circuit. Second, the menu hierarchy arguably was not
 14 even a series of instructions for “bringing about *a certain result*,” 17 U.S.C. § 101 (emphasis
 15 added), but was a general purpose system or method of operation for bringing about whatever
 16 result a spreadsheet user might want. But even if the Lotus menu hierarchy could qualify as a
 17 “computer program,” the accused aspects of the Oracle APIs are more abstract than that. They
 18 are not limited to the use of a spreadsheet program; they apply to the use of a programming
 19 language. Thus, even if Oracle were correct that the *Lotus* reasoning *could* be misapplied, *on the*
 20 *facts of the present case* the accused aspects of the APIs are uncopyrightable.

21 The Tenth Circuit’s disagreement with the *Lotus* reasoning does not help Oracle either.
 22 The Tenth Circuit “conclude[d] that although an element of a work may be characterized as a
 23 method of operation, that element may nevertheless *contain* expression that is eligible for
 24 copyright protection.” *Mitel*, 124 F.3d at 1372 (emphasis added). Such expression may be
 25 protectable, even if at a “higher level of abstraction” the material is a method of operation. *Id.*³

26 ² Oracle concedes that the APIs do not bring about any results unless paired with an underlying
 27 implementation. *See* Oracle 4/3/12 Br. [Dkt. 853] at 5 (“whoever runs a program that includes
 API calls . . . needs an executable implementation of the APIs.”).

28 ³ The other cases cited by Oracle as disagreeing with the *Lotus* approach, *eScholar, LLC v. Otis*
 3

1 Google *agrees*. The source code Google wrote to implement the APIs is copyrightable
 2 expression, even though it implements what is, at a higher level of abstraction, an unprotectable
 3 method of operation.⁴

4 But *the Tenth Circuit never held that the command codes at issue were not a method of*
 5 *operation*. Instead, it affirmed based on a lack of *originality*. *See id.* at 1373-76. In fact, after
 6 explaining that a method of operation can contain expression, the decision never again uses the
 7 phrase “method of operation.” Because it affirmed on other grounds, the Tenth Circuit *did not*
 8 *need to address* whether there was protectable expression at a level of abstraction below the
 9 unprotected method of operation at issue.⁵

10 Oracle’s dogged reliance on the pre-*Feist* decision in *Johnson Controls, Inc. v. Phoenix*
 11 *Control Sys., Inc.*, 886 F.2d 1173 (9th Cir. 1989), also does not help it. The Ninth Circuit did not
 12 hold that “some discretion and opportunity for creativity” compels the conclusion that material is
 13 expressive. *See id.* at 1176. Instead, on a review for clear error of a preliminary injunction, it
 14 concluded that this fact “supports” a finding of expression, while also noting that “[t]his issue will
 15 no doubt be revisited at trial” *Id.* *Johnson Controls* held only that “structure, sequence and

16 organization” will *sometimes* be protected. *See id.* at 1175.

17 *Educ. Sys.*, 76 U.S.P.Q.2d (BNA) 1880, 1897 (S.D.N.Y. 2005), and *Toro Co. v. R&R Prods. Co.*,
 18 787 F.2d 1208, 1212 (8th Cir. 1986), are no different, holding only that what is a method of
 19 operation at one level of abstraction may contain expression at a lower level of abstraction.
 20 Oracle also ignores other circuit court opinions that adopt analyses of Section 102(b) similar to
 21 that used in *Lotus*. *See Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1012 (7th
 22 Cir. 2005); *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1383-84 (Fed. Cir. 2007).

23 ⁴ In a non-sequitur, Oracle argues that the Court should not follow *Lotus* because “the Java class
 24 libraries . . . qualify for copyright protection because they are computer programs written in
 25 source code.” Oracle 4/3/12 Br. at 12. But there is no dispute that, aside from the nine-line
 26 rangeCheck() method, the source code is not at issue. In a similar non-sequitur, Oracle cites
 27 *Apple Computer, Inc. v. Formula Int’l, Inc.*, 725 F.2d 521 (9th Cir. 1984), a pre-*Feist* case. In
 28 that case, the Ninth Circuit rejected Formula’s argument that operating systems are unprotectable
 methods of operation. *Id.* at 523-25. But that case did not address whether the *non-literal* aspects
 of an operating system are copyrightable, because Formula *conceded* that its *code* was
 substantially similar to Apple’s code. *See id.* at 522-23. Apple, meanwhile, conceded that it
 sought “to copyright only its particular set of instructions, not the underlying computer process.”
Id. at 525. *Apple v. Formula* does not address any of the disputed issues in the present case.

29 ⁵ Oracle cites an article by Professor Miller about the scope of *Lotus*. *See Arthur R. Miller,*
 30 *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works*, 106
 31 HARV. L. REV. 977 (1993). Professor Miller wrote that article while serving as counsel to *Lotus*
 32 in that case. *See Samuelson*, 85 TEX. L. REV. at 1949 n.191.

1 Moreover, under Ninth Circuit precedent, Section 102(b) precludes copyright protection
 2 for functional requirements for compatibility. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510,
 3 1522 (9th Cir. 1992). Google has not “mischaracterized” *Sega*. The Ninth Circuit explained:

4 The declarations of Accolade’s employees indicate, and the district court found,
 5 that Accolade copied Sega’s software solely in order to discover the functional
 6 requirements for compatibility with the Genesis console—aspects of Sega’s
 7 programs that are not protected by copyright.

8 977 F.2d at 1522 (citing 17 U.S.C. § 102(b)). That passage indicates two things. First, as a
 9 *factual* matter, Accolade copied Sega’s software (Sega’s *implementing* code) for the purpose of
 10 discovering functional requirements for compatibility. Second, as a *legal* matter, those functional
 11 requirements for compatibility “are not protected by copyright,” and the *legal* basis for that is
 12 Section 102(b). *Id.* (citing 17 U.S.C. § 102(b)). The ultimate question was whether Accolade’s
 13 “intermediate copying” was a fair use, to which the court answered “yes.” *Id.* at 1527-28. But
 14 the court could only reach that conclusion by relying on the *legal principle* that Section 102(b)
 15 excludes functional requirements for compatibility from copyright protection.⁶

16 **B. There is no numerosity exception to Section 102(b).**

17 Oracle argues that because its APIs meet the “extremely low” constitutional threshold for
 18 originality, *see Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), and because
 19 the 37 APIs at issue have many elements, they are copyrightable. Oracle 4/3/12 Br. at 1-2 (citing
 20 *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)). But *Satava* held only that such a work “is
 21 eligible” for copyright protection, *id.*, explaining only how a combination might meet the
 22 extremely low constitutional threshold for originality, and not other requirements for
 23 copyrightability.⁷ “*In no case*” does protection for even an “*original work of authorship*” extend
 24 to “any idea, procedure, process, system, method of operation, concept, principle, or discovery,
 25 regardless of the form in which it is described, explained, illustrated, or embodied in such a

26 ⁶ The Section 102(b) issues distinguish this case from *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th
 27 1999). CDN did not seek protection for a *system* of coin pricing, or a *method of operation* for
 28 coin pricing. Nor could Kapes argue that there were any functional requirements of compatibility
 requiring its use of CDN’s prices.

29 ⁷ The focus on originality is apparent in the court’s citation to *Feist* for the proposition that the
 30 “principal focus should be on whether the selection, coordination, and arrangement are
 31 sufficiently original to merit protection.” *Id.* (quoting *Feist*, 499 U.S. at 358).

1 work.” 17 U.S.C. § 102(b) (emphases added).

2 **C. Oracle’s other Section 102(b) cases are inapposite.**

3 Oracle claims that *Practice Mgmt. Info. Corp. v. American Med. Ass’n*, 121 F.3d 516,
 4 518-19 (9th Cir. 1997), supports its position. It does not, because that case addressed only
 5 whether a *book describing* a code system was copyrightable.⁸ And the Seventh Circuit’s similar
 6 decision in *American Dental Ass’n v. Delta Dental Plans Ass’n*, 126 F.3d 977 (7th Cir. 1997),
 7 was either wrongly decided, or unclear about its scope. The court claims to have addressed
 8 whether the ADA’s “*taxonomy*” for dental procedures was copyrightable subject matter. *Id.* at
 9 977. But in concluding that the “*taxonomy*” was expressive, the Seventh Circuit relied on *the text*
 10 *descriptions* the ADA employed. *See id.* at 979. That suggests the issue was the copyrightability
 11 of the ADA’s *book about the taxonomy*, not the taxonomy itself.⁹

12 Moreover, the Seventh Circuit held that *using* the taxonomy would not infringe. *See id.* at
 13 981 (citing 17 U.S.C. § 102(b)). But, according to the Seventh Circuit, Section 102(b) did “not
 14 permit Delta to copy *the Code itself*, or make and distribute a *derivative work based on the Code*,
 15 any more than Baker could copy Selden’s book.” *Id.* (emphasis added). Thus, although the
 16 Seventh Circuit claimed it was deciding whether a “*taxonomy*” was copyrightable, the only thing
 17 it actually held was that copying “*the Code*” (earlier described as *a book*, *see id.* at 979) would
 18 infringe, as would making and distributing a “*derivative work*” based on the Code. *Id.* at 981.
 19 The court did not address the standard for determining what would be derivative, concluding that
 20 “[w]hether there are other obstacles to the relief the ADA seeks is a subject best left to the district
 21 court in the first instance.” *Id.*¹⁰

22
 23 ⁸ The work at issue was the AMA’s *book*, the *Physician’s Current Procedural Terminology*
 24 (“*CPT*”). *Id.* at 517. The *CPT* identifies “more than six thousand medical procedures and
 25 provides a five-digit code *and brief description* for each.” *Id.* (emphasis added). Nothing in the
 26 opinion suggests that the *code system*, divorced from the AMA’s *book*, was at issue. *See id.* at
 27 518-20. The Ninth Circuit affirmed the AMA’s copyright in “the *CPT*,” which the opinion earlier
 28 defined as the *book* itself, and which included the text descriptions. *See id.* at 517, 520.

⁹ The court further relied on the fact that the codes for the taxonomy could have been different in
 length, or used different numbers. *See id.* The court did not, however, explain what was
 “expressive” about that.

¹⁰ That said, the Seventh Circuit does appear to have concluded that the actual numbers used by
 the ADA were copyrightable subject matter under Section 102(a). *Id.* at 979.

1 In a better reasoned opinion, the Sixth Circuit has commented that the Seventh Circuit's
 2 "rationale for holding that the individual procedure numbers were copyrightable is rather
 3 opaque." *ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions*, 402 F.3d 700, 708 (6th
 4 Cir. 2005). The Sixth Circuit concluded that none of the factors considered by the Seventh
 5 Circuit "evidences any creativity by the ADA that would render the numbers eligible for
 6 copyright protection." *Id.* "Original and creative *ideas*, however, are not copyrightable, because
 7 17 U.S.C. § 102(b) provides that 'in no case does copyright protection for an original work of
 8 authorship extend to any idea, procedure, process, system, method of operation, concept,
 9 principle, or discovery, regardless of [its] form.'" *Id.* at 707. "And all of the creative aspects of
 10 the ATC classification scheme are just that: ideas. ATC cannot copyright its prediction of how
 11 many types of sealing ring will be developed in the future, *its judgment that O-rings and sealing*
 12 *rings should form two separate categories of parts, or its judgment that a new part belongs with*
 13 *the retainers as opposed to the pressure plates.*" *Id.* (emphasis added). Similarly, Oracle cannot
 14 copyright its decisions about how to group classes or the other aspects of the selection,
 15 arrangement and structure of the APIs.

16 The Sixth Circuit also rejected ATC's argument that the combination of the elements of
 17 its classification was protectable:

18 As a last resort, ATC suggested during oral argument that even if neither the ideas
 19 that gave rise to the parts numbers, nor the individual part numbers, *qua*
 20 expressions of those ideas, are copyrightable, the part numbers taken as a whole
 21 were somehow copyrightable as a middle ground between the two, much in the
 22 same way that while neither the basic idea behind a novel nor the individual words
 23 used to write it are protected, the story that those words form when taken together
 is copyrightable. The flaw in this argument is that there is no such middle ground
 in this case. Unlike the words that comprise a novel, which add up to a story, ***the***
numbers used in ATC's catalog only add up to a long list of numbers. Putting
all the numbers together does not make them expressive in the way that putting
words together makes a narrative.

24 *Id.* at 710. Oracle's argument is equally unavailing, because its organization similarly is
 25 inexpressive.¹¹ Whether the Court relies directly on a lack of expression or on the exclusions in
 26 Section 102(b), the selection, arrangement and structure of Oracle's APIs are not copyrightable.

27 ¹¹ The sole example of alleged expressiveness in Oracle's brief is based on a hearsay Wikipedia
 28 article and attorney argument. *See* Oracle 4/3/12 Br. [Dkt. 853] at 4.

1 **III. The merger doctrine bars copyright protection for the 37 APIs.**

2 In the part of its brief addressing merger Oracle argues that the selection, arrangement and
 3 structure of its APIs are “expression.” *See* Oracle 4/3/12 Br. [Dkt. 853] at 3-4. That misses the
 4 point. Merger *denies protection to expression* that has merged with the underlying idea. “When
 5 the ‘idea’ and its ‘expression’ are thus inseparable, *copying the ‘expression’ will not be barred*,
 6 since protecting the ‘expression’ in such circumstances would confer a monopoly of the ‘idea’
 7 upon the copyright owner free of the conditions and limitations imposed by the patent law.”
 8 *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F. 2d 738, 742 (9th Cir. 1971) (emphasis
 9 added) (citing, among other cases, *Baker v. Selden*, 101 U.S. 99, 103 (1879)).

10 The merger case cited by Oracle elsewhere in its brief, *Atari Games Corp. v. Nintendo of*
 11 *Am. Inc.*, 975 F.2d 832 (Fed. Cir. 1992), does not help it. As in *Johnson Controls*, the Federal
 12 Circuit in *Atari* was reviewing a preliminary injunction under the clear error standard. *Id.* at 835,
 13 840. Based on the preliminary injunction record, the court found “no clear error in the district
 14 court’s conclusion” that the expression in Nintendo’s “unlock” code did not merge with the
 15 underlying “process” because Nintendo had “produced expert testimony showing a multitude of
 16 different ways to generate a data stream which unlocks the NES console.” *Id.* at 840. Here, the
 17 opposite is true—source code written by developers using the 37 APIs at issue *would not work* if
 18 Android did not have substantially the same selection, arrangement and structure of elements for
 19 those APIs as J2SE 5.0. Atari, in contrast, copied aspects of the structure of Nintendo’s unlock
 20 program that were unnecessary to unlock the NES console. *Id.* at 844-45.

21 Moreover, as Google has explained, the Ninth Circuit does not limit application of the
 22 merger doctrine to high levels of abstraction. *See* Google 4/3/12 Br. [Dkt. 852] at 8-9. To the
 23 contrary, the Ninth Circuit has applied the merger doctrine to deny copyright protection for one
 24 person’s *particular expression* of his own *particular rules* for his own *particular games*. *See*
 25 *Allen v. Academic Games League of Am., Inc.*, 89 F.3d 614, 618 (9th Cir. 1996).

26 **IV. Computer programming languages are not copyrightable.**

27 Oracle offers no affirmative basis for concluding that a computer programming language

1 can be copyrighted, noting only that it is unaware of any “federal”¹² judicial decision holding
 2 otherwise. Oracle cites a Southern District of New York holding copyrightable a set of codes that
 3 lacked any meaning or grammar, *see Reiss v. National Quotation Bureau, Inc.*, 276 F. 717, 718
 4 (S.D.N.Y. 1921) (Learned Hand, J.)), but that decision is of doubtful value, because ten years
 5 later the Second Circuit held that a published system for shorthand could *not* be protected by
 6 copyright. *See Brief English Sys., Inc. v. Owen*, 48 F.2d 555 (2d Cir. 1931).¹³

7 Regardless, the Court did not ask whether a set of codes that is free of any semantics can
 8 be copyrighted. The Court asked whether a computer programming language can be copyrighted.
 9 The fact that a language—or indeed, the APIs at issue—can be used *by others* to express, and has
 10 a structure designed to support that expression by others, distinguishes it from the code book at
 11 issue in *Reiss*, and is precisely what makes it a *system* for expression, or a *method for operation*
 12 for communication. Section 102(b) forecloses copyright protection for that reason.¹⁴

13 **V. Subject to the terms of the Patent Act, one can try to patent a selection of APIs.**

14 Oracle agrees with Google that it is possible to try to patent a selection of classes for
 15 APIs, though the selection of classes would need to be part of a “new and useful process,
 16 machine, manufacture, or composition of matter.” 35 U.S.C. § 101; *see Oracle* 4/3/12 Br. at 6.¹⁵
 17 Oracle notes, however, that it is commonplace for patents to include copyright notices. But the
 18 fact that patent specifications can *contain* copyrighted material is of no relevance. As the Federal
 19 Circuit has recognized, copyright and patent are fundamentally distinct legal regimes protecting

20 ¹² Opinions outside the United States have so held. *See Google* 4/3/12 Br. [Dkt. 852] at 14-16.

21 ¹³ Judge Hand’s reasoning is also at odds with *Toro*, relied upon by Oracle elsewhere in its brief.
 22 In *Toro*, the Eighth Circuit held that an arbitrary collection of part numbers does not even cross
 23 the originality threshold required by the Copyright Act. 787 F.2d at 1213. Under this reasoning,
 24 the codes at issue in *Reiss*, which had “as yet no meaning,” could not have been copyrightable.

25 ¹⁴ Oracle also fails to state whether a computer language is patentable. Oracle’s citation to
 26 *O’Reilly v. Morse*, 56 U.S. 62 (1854), is irrelevant, because Morse code is not a language (as
 27 Oracle as much as concedes, noting that it lacks a vocabulary or grammar), let alone a computer
 28 language. However, computer programming languages are not patentable. *See Google* 4/3/12 Br.
 29 at 16-17. That does not imply that a computer language must be copyrightable, because not
 30 everything is protected by copyright or patent. *Cf. Mayo Collaborative Servs. v. Prometheus*
 31 *Labs, Inc.*, 132 S. Ct. 1289, 1293 (2012) (“Laws of nature, natural phenomena, and *abstract*
 32 *ideas*’ are not patentable.”) (quotation marks and citation omitted, and emphasis added).

33 ¹⁵ Google reiterates that such a patent claim would be subject to challenge on any ground allowed
 34 by the Patent Act.

1 different types of intellectual property. *Atari*, 975 F.2d at 839 (“Thus, patent and copyright laws
 2 protect distinct aspects of a computer program.”). That distinction was well understood in the
 3 pre-1976 Copyright Act case law codified in Section 102(b) of the Copyright Act.¹⁶ That the
 4 source code *implementing* a patented process, for example, can be copyrighted does not mean that
 5 the process *itself* can be copyrighted. *See* 17 U.S.C. § 102(b) (“processes” not protected).

6 **VI. There is no basis for a motion to attack Google’s equitable defenses.**

7 Oracle belatedly seeks leave to attack two of Google’s four equitable defenses, arguing
 8 Google has not produced evidence of reliance. Such a motion would be both too late and an
 9 improper attempt to seek summary judgment through an *in limine* motion. *See* Order [Dkt. 384]
 10 at 1 (limiting parties to five *in limines* and warning that a “disguised summary judgment motion”
 11 would be “highly disfavored”). Moreover, Oracle’s characterization of discovery on this issue is
 12 inaccurate. Both parties challenged the adequacy of the other’s responses to contention
 13 interrogatories, the parties ultimately agreed on the level of supplementation and detail to be
 14 provided, and Oracle did not challenge Google’s supplemental response. Most importantly,
 15 Oracle’s assertion that these two defenses “turn on” statements made in 2011 is simply incorrect.
 16 As Oracle is well aware, it deposed Google witnesses such as Eric Schmidt and learned that they
 17 knew of Sun’s statements approving of Android years ago, and understood them to mean that Sun
 18 had no issue with Android.

19 Dated: April 5, 2012

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 21 ROBERT A. VAN NEST

22 Attorneys for Defendant
 23 GOOGLE INC.

24
 25
 26 ¹⁶ *See, e.g., Taylor Instrument Cos. v. Fawley-Brost Co.*, 139 F.2d 98 (7th Cir. 1943) (“Thus it
 27 appears that Congress has provided two separate and distinct fields of protection, the copyright
 28 and the patent.”). *Mazer v. Stein*, 347 U.S. 201 (1954), is not to the contrary. There the Court
 held that “the patentability of [Stein’s] statuettes, fitted as lamps or unfitted, does not bar
 copyright as works of art.” *Id.* at 217. The patent in that case, however, was not for a “useful
 art”—it was a *design* patent, covering the ornamental design of the lamp. *Id.* at 215.